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No. 457

In the Supreme Court of the United States

OCTOBER TERM, 1948

WILLIAM H. HIATT, WARDEN, UNITED STATES PENITENTIARY, LEWISBURG, PENNSYLVANIA, PETITIONER

v.

BERNARD W. SMITH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM SUGGESTING A QUESTION OF ABATEMENT

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The Solicitor General is submitting this memorandum for the purpose of suggesting a question of abatement which appears to be present in this case.

The proceeding originated with the filing of a petition for a writ of habeas corpus (R. 2–5) to secure the release of the relator Smith, respondent herein, from the custody of William H. Hiatt, the then Warden of the United States Penitentiary at Lewisburg, Pennsylvania, who was holding the relator pursuant to the judgment and

sentence of an army general court-martial. After a hearing, the District Court, on August 7, 1947, denied the petition (R. 275). On appeal, the Court of Appeals for the Third Circuit, on September 14, 1948, reversed the judgment of the District Court and remanded the cause with directions to discharge the relator (R. 287). On December 10, 1948, the Government filed a petition for a writ of certiorari on behalf of Warden Hiatt, the mandate of the Court of Appeals having in the meantime been stayed.

Since the filing of the petition for a writ of certiorari, it has been brought to the attention of the Solicitor General that on April 28, 1948, while the case was pending on appeal before the Court of Appeals, Mr. Hiatt was transferred from the United States Penitentiary at Lewisburg, Pennsylvania, to the United States Penitentiary at Atlanta, Georgia, where he succeeded Joseph W. Sanford as Warden, and was succeeded as Warden of the Lewisburg Penitentiary by George W. Humphrey, formerly Warden of the Federal Correctional Institution, Sandstone, Minnesota. Under Rule 25 (d) of the Federal Rules of Civil Procedure,[1] the respondent Smith

[1] Rule 25 (d) provides as follows:

"When an officer of the United States, the District of Columbia, a state, county, city, or other governmental agency, or any other officer specified in the act of February 13, 1925, ch. 229, § 11 (43 Stat. 941), U. S. C., Title 28, § 780, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and

had six months from the time Mr. Humphrey succeeded Mr. Hiatt as Warden of the Lewisburg Penitentiary, *i. e.*, until October 28, 1948, to move for the substitution of Mr. Humphrey. Since no such motion has been made, a question arises as to whether the action has abated beyond possibility of revival.

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maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object."

Section 11 of the Act of February 13, 1925 (28 U. S. C., 1946 ed., 780 (a)), to which reference is made in Rule 25 (d), and which was repealed as of September 1, 1948, by the 1948 Revision of Title 28 of the United States Code (Act of June 25, 1948, Public Law No. 773, 80th Cong., 2d sess., §§ 38 and 39), similarly provided for substitution of a successor public officer for his predecessor and specified the same six-month time limit, but differed from the Rule in that the time as of which the six-month period commenced to run was fixed by the statute as the date of the death or separation from office of the predecessor officer. Some doubt has been entertained by the Government as to whether the Rule or the statute governed substitutions in the appellate courts in cases where the disparity mentioned was significant (see our memorandum in opposition to the granting of certiorari in *Fowler* v. *Gill*, No. 334, O. T. 1946, fn. 4; compare *United States ex rel. Trinler* v. *Carusi*, 168 F. 2d 1014, 1015 (C. A. 3)); but there is some authority that the Rule superseded the statute as the controlling authority in the matter of substitu-

This question must be considered in the light of *United States ex rel. Claussen* v. *Curran*, 276 U. S. 590, *Matheas* v. *United States ex rel. Cunningham*, 282 U. S. 802, and *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422, 426, all involving habeas corpus actions in which there was a failure to substitute within the prescribed six-month period.

In the *Claussen* case, the respondent in the habeas corpus action was Henry H. Curran, Commissioner of Immigration. The District Court dismissed the writ on February 1, 1926; the Court of Appeals affirmed the judgment on December 14, 1926, and this Court granted a writ of certiorari on March 7, 1927. While the case was pending in this Court, the Solicitor General filed a suggestion of abatement, pointing out that the respondent Curran had resigned his office on March 31, 1926, while the case was before the Court of Appeals, and that one Day had succeeded him at that time. The Solicitor General

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tions not only in the district courts but in the appellate courts as well. See p. A239 of H. Rep. 308, 80th Cong., 1st sess., accompanying H. R. 3214, where it is explained that the reason for the repeal of the substitution statute by the 1948 Revision of Title 28 of the United States Code was the fact that it had been "superseded by Rules 25 and 81 of the Federal Rules of Civil Procedure." See also *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 119. The 1925 Act, which was in effect on the critical dates, for purposes of abatement, involved in *Daggs* v. *Klein*, and *Braito* v. *Klein*, Nos. 411 and 412, this Term, in which certiorari was denied on January 10, 1949, clearly does not apply here.

stated in his suggestion of abatement that he was "willing to have the cause continued in the name of Benjamin M. Day, Commissioner of Immigration, as respondent, and, in so far as his consent may be effective for that purpose, the Solicitor General hereby gives such consent" (Suggestion of Abatement, No. 166, O. T. 1927, p. 2). Notwithstanding this expression of willingness to have the cause continued, however, this Court entered an order reading in pertinent part as follows (276 U. S. 590–591):

> It appearing that Henry H. Curran, sued herein as Commissioner of Immigration, resigned such office on March 31, 1926, and was succeeded by Benjamin M. Day, who now holds that office, and that no motion was made under § 11 of the act of February 13, 1925 (c. 229, 43 Stat. 936, 941), asking the Court to "permit the cause to be continued and maintained by or against the successor in office of such officer," and that the six months' period, within which such a motion could have been made, has expired, the Court now vacates the judgments entered in the District Court and in the Circuit Court of Appeals and remands the cause to the District Court with a direction to dismiss the cause as abated.

In the *Matheus* case, the respondent in the habeas corpus action was W. Frank Matheus, United States Marshal for the Eastern District of Pennsylvania. The District Court dismissed

the petition for the writ on May 10, 1928, the Court of Appeals reversed the judgment on June 13, 1930, and a petition for a writ of certiorari was filed in this Court on behalf of the respondent Matheus on September 12, 1930. At this juncture the fact that Matheus' term of office as Marshal had expired on March 2, 1930, was first discovered by the parties. On September 24, 1930, the Court of Appeals, by agreement of the parties,[2] entered an order substituting Matheus' successor, Fetters, *nunc pro tunc* as of March 3, 1930, the date he took office. But since the six-month period for substitution allowed by statute had already expired on September 2, 1930, the Solicitor General, on October 4, 1930, suggested to the Court of Appeals that the action had abated. That court, however, declined to act on the suggestion while the petition for certiorari was pending in this Court.[3] The suggestion of abatement was then made to this Court, and on the authority of the *Claussen* case, this Court entered an order (282 U. S. 802) vacating the judgments of the Court of Appeals and the District Court and remanding the cause to the District Court with directions to dismiss the proceeding as abated.

[2] The facts recited are taken from the Suggestion of Abatement, No. 451, O. T. 1930.

[3] The situation presented in the recent case of *United States ex rel. Trinder v. Carusi*, 168 F. 2d 1014 (C. A. 3), was basically similar to the situations in the *Claussen* and *Matheus* cases, except for the fact (which we deem imma-

However, in the later case of *United States ex rel. Volpe v. Smith*, 289 U. S. 422, where the facts differed from those in the *Claussen* and *Mathues* cases in one important respect, this Court held there was no abatement. The habeas

terial) that the action there involved was a proceeding for judicial review of a deportation order under Section 10 of the Administrative Procedure Act. In the *Trinler* case, the District Court had ruled that the Administrative Procedure Act does not authorize judicial review of a deportation order and dismissed Trinler's action brought for that purpose against Ugo Carusi, the then Commissioner of Immigration and Naturalization. The Court of Appeals reversed this judgment on February 16, 1948. The Solicitor General was about to file a petition for a writ of certiorari in this Court when it was discovered that the respondent Carusi had resigned his office as Commissioner and been succeeded by Watson Miller on August 27, 1947, more than six months previously, and that no substitution had been effected. The Solicitor General reluctantly called this fact to the attention of the Court of Appeals on June 21, 1948. That court of Appeals then entered an order recalling its mandate, vacating its own judgment and the judgment of the District Court, and remanding the cause to the District Court with directions to dismiss the cause as abated.

The Court of Appeals said in its opinion that there was much to be said for the view that "the real party in interest is the Attorney General of the United States who has held office throughout the whole of the proceeding; that the Commissioner of Immigration and Naturalization is but an arm or an agent of the Attorney General who is the real party respondent in the case and that the ends of justice would be best served by penetrating the form and looking solely to the substance of the action" (168 F. 2d. at 1015), but ruled as it did on the authority of its own substitution rule (which incorporated by reference the now-repealed substitution statute referred to in note 1, *supra*, pp. 2-4) and this Court's decision in the *Claussen* case.

corpus proceeding in the *Volpe* case was against S. D. Smith, District Director of Immigration at Chicago. The District Court dismissed the writ on June 16, 1931. The Court of Appeals, after first reversing the judgment on June 21, 1932, later affirmed it, on rehearing, on January 11, 1933. Volpe thereafter filed a petition for a writ of certiorari in this Court. The Solicitor General then filed a Suggestion of Abatement (No. 724, O. T. 1932), stating that while the case was pending on appeal in the Court of Appeals, the respondent S. D. Smith had "ceased to hold office as District Director of Immigration in January, 1932"; that he "was succeeded by C. Alfred Palmer, who was appointed January 14, 1932, entered upon the duties of the office February 1, 1932, and took the oath of office March 3, 1932"; and that no substitution had been effected within the six-month period allowed for that purpose, the period having long since expired. The *Claussen* and *Matheus* cases, as well as *LeCrone* v. *McAdoo*, 253 U. S. 217, 219,[1] were cited as authorities for the proposition that the failure to substitute required abatement of the action. Volpe filed a reply brief opposing the suggestion of abatement, and this Court granted

[1] The *LeCrone* case, a mandamus suit against Secretary of the Treasury McAdoo, involved, like the *Claussen* case, a situation where the respondent official had resigned his office and there had been no substitution within the period allowed, with the consequence that this Court held "the whole proceeding [to be] at an end."

certiorari. In Appendix B to the Solicitor General's brief on the writ, the question of abatement was more fully discussed. It appears from this Appendix (p. 43) that although the respondent S. D. Smith had ceased to hold office as District Director of Immigration at Chicago, he had not resigned or severed his connection with the Department of Labor, or indeed with the Immigration Service, but had been "appointed District Director of Immigation at Salt Lake City, Utah"; that is, he had merely been transferred from one Office in the Immigration Service to another Office, retaining the same title as previously, except for the geographical area under his supervision. The Solicitor General further stated (Appendix B, pp. 44–47) that:

> The present suit was obviously brought to prevent the present or future discharge by the respondent Smith of his duties with reference to the execution of the warrant of deportation. The warrant is not self-executing, and the immigration officer in charge of the particular district where a deportation proceeding has taken place has certain duties which are imposed upon him in connection with deportation by the regulations of the Secretary of Labor. To enumerate some of those duties in the ordinary case, he must secure a passport for the deportee, if a passport can be obtained locally; this passport must be forwarded to the port of departure (Rule 19, subdivision H, pars. 1, 2); and arrangements

must be made for the transportation of the deportee and his personal effects (Rule 19, subdivisions P and Q, Immigration Regulations, 1930). Special provisions are made in the regulations for the deportation of insane or diseased aliens (Rule 20, Immigration Rules, 1930); and if the alien is to be deported to Canada or Mexico, certain additional duties are imposed upon the immigration officer in charge of the district wherein the case originated (Rule 19, subdivisions I. and J, Immigration Rules of 1930). Obviously, it would tend to cause confusion in the administration of the immigration laws if the immigration officer in charge of one district could go into another district and perform the duties which under the regulations properly fall to the lot of another District Director. The regulations clearly do not contemplate that a District Director shall have a roving commission, although it may be conceded that there is no prohibition therein which would preclude Smith from going to his old district for the purpose of completing his duties in connection with this case.

In response to the suggestion of abatement petitioner contends that Smith has not "ceased" to hold the office of District Director of Immigration, even though he has been placed in charge of another district. This seems to ignore the fact that the instant suit was brought against Smith in connection with the discharge of duties

imposed upon him as District Director of Immigration in charge of the Chicago District. Apparently, he has ceased to hold that office quite as much as if he had been appointed to such a post as stenographer in the Salt Lake immigration office. It is true that he is still a District Director of Immigration, but the position which he now holds is so distinctly a different position as to require the taking of a new oath of office.

On its face, the warrant of deportation indicates that it may be executed by anyone in the immigration service, but there are practical difficulties attending execution which suggest that the broad form of the warrant does not necessarily control. As we have indicated, under the regulations the initial steps incident to the deportation of an alien, in the absence of exceptional circumstances, are taken by the immigration officer in charge of the district wherein the case originated, i. e., the district where the alien was arrested and the deportation proceedings were held. As will be seen from the memorandum dated April 12, 1933, prepared for the Solicitor of the Department of Labor at the request of the Solicitor General by the Chief of the Deportation Division of the Bureau of Immigration, which is printed as Appendix C,

the warrant of deportation is addressed not only to the District Director of Immigration in charge of the district having jurisdiction of the deportation proceedings but to "any officer or employee of the United States Immigration Service" merely as a protection to any such officer who may have charge of the custody of the deportee while he is being transported from the district where the deportation proceedings were held to the port of departure. The view that Smith may still execute the warrant of deportation even though he is not now District Director of Immigration in Chicago, because of the apparently broad grant of authority contained in the warrant, seems to leave out of consideration the purpose of that grant, as indicated by the regulations and practice with respect to the execution of deportation warrants. On the other hand, it seems by no means certain that these practical difficulties could not be overcome in the novel circumstances of this case. * * *

As in the *Claussen* case, the Solicitor General de it clear that it was only with reluctance t he felt it necessary to argue that the cause l probably abated, stating that "it would be irable to have the case disposed of on the rits and we should be glad to have the Court clude that there has been no abatement" (p.

This Court declined, however, in view of the cial facts in the *Volpe* case, to accept the

suggestion of abatement, stating (289 U. S., at 426):

> With hesitation, the Solicitor General suggested here that possibly the cause had abated, since S. D. Smith is no longer District Director of Immigration at Chicago, where he formerly held the petitioner in custody. The record indicates that Smith has continued to be an officer in the Department of Labor, although not presently stationed at Chicago. So far as we are advised, under existing regulations, he may carry into effect the order of deportation. Moreover, the cause was permitted to proceed without question, as instituted, long after Smith is said to have left Chicago; and the petitioner insists that no cause has been shown for abatement. The point, we think, lacks merit.

It thus appears that the question of whether or not a cause of action against a public officer has abated beyond possibility of revival, where there has been a failure to substitute his successor within the period allowed, may depend on whether the predecessor officer has severed his connection entirely with the agency, bureau or department involved, by resignation or otherwise (as in *Claussen*, *Mathews*, *McAdoo*, and *Trinler*), or whether he continues to be an officer in the agency, bureau or department in question, though by reason of his change of status within the department he no longer, strictly speaking, has the same official powers and functions, at least in

respect of the geographical area subject to his supervision, as he had when the action was originally brought (as in *Volpe*). The case at bar would seem to fall within the ambit of the *Volpe* case rather than the others which we have discussed. Here, Mr. Hiatt is no longer Warden of the United States Penitentiary at Lewisburg, Pennsylvania, but he has not resigned or severed his connection with the Bureau of Prisons or Department of Justice. He has merely been involved in a "within-the-family" transfer of Wardens, and remains subject, as before, to the control and supervision of the Director of the Bureau of Prisons, and ultimately of the Attorney General (see 18 U. S. C., 1943 Revision, 4001, 4041, 4042).[5] As in the *Volpe* case, the regulations of the Bureau of Prisons (see *Manual of Policies and Procedures for the Administration of the Federal Penal and Correctional Service* (1942)) do not contemplate that the Warden of a federal penitentiary shall have a "roving commission" with power to go to another penitentiary and perform duties which "properly fall to the lot of another" Warden (cf. Appendix B to our brief in the *Volpe* case, *supra*, p. 10). On the other hand, as in the *Volpe* case, it is equally true that there is no prohibition in the regulations which would

[5] We are advised by the Bureau of Prisons that when a Warden of a United States Penitentiary is transferred to another United States Penitentiary in the same capacity, a new oath of office is not required.

preclude Mr. Hiatt from returning to his former post "for the purpose of completing his duties in connection with this case" (cf. *ibid.*). The fact that the mandate of the Court of Appeals directing respondent Smith's discharge from custody is directed to Mr. Hiatt, who no longer has custody of Smith, poses no practical difficulty in connection with carrying out the mandate, and this would remain true in the event this Court should grant certiorari and affirm the judgment of the Court of Appeals. If considered necessary, it would be feasible for Mr. Hiatt to return, at the direction of the Director of the Bureau of Prisons, to Lewisburg Penitentiary for the limited purpose of effecting Smith's discharge in accordance with the mandate. Of course, if this Court should grant certiorari and reverse the judgment of the Court of Appeals, as we urge, there would be no problem, since in that event the order of the District Court, remanding Smith to custody, would become final. But the decisive factor, it would seem to us, is that this is a proceeding essentially against the United States, and, at least for purposes of substitution of parties, the cause has not "abated" in any real sense, simply because of the transfer of the warden against whom the petition was originally filed. See *Goodwin* v. *United States*, 165 F. 2d 334 (C. A. 8), certiorari denied, 334 U. S. 828.

We have no desire to have this cause abate, and it was due only to inadvertence that the Government (in the absence of any action by respondent or his counsel) did not take timely steps to effect substitution of Mr. Hiatt's successor. The consequence of a determination that the cause has abated will be merely that the habeas corpus proceeding will have to be re-instituted with Mr. Humphrey as the party respondent, but without any change in the substantive issues involved. This result seems so highly undesirable that any legal justification for a holding that the cause has not abated should, we submit, be here invoked. We believe, for the reasons stated, that there is a valid basis for such a holding, on the authority of the *Volpe* case. Nevertheless, we have deemed it our duty to bring the facts to the Court's attention for appropriate action.

If the Court should consider that the cause has not abated, the Government respectfully requests, in order that the caption of the case may reflect the present situation, that the present warden, George W. Humphrey, be substituted as party petitioner in this Court, in place of William H. Hiatt; and this memorandum may accordingly be treated as a motion for that purpose. If, however, the Court should consider that the cause has abated beyond possibility of revival, it is suggested that certiorari be granted, that the judgment of the Court of Appeals be vacated, and the

cause remanded to the District Court with directions to dismiss the cause as abated.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

JANUARY 1949.

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